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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1986

STEVEN CINNANTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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Petitioner, Steven Cinnante, seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on November 3, 1986, denying Cinnante's Petition for Rehearing En Banc and its earlier judgment of August 25, 1986 affirming his conviction.

QUESTIONS PRESENTED

1. Did the Second Circuit Court of Appeals err in ruling that the testimony of an identification expert is inadmissible under Fed.R.Evid. 702 if not based on personal knowledge of the circumstances underlying the identification and if it coincides with the "common experience" of the trier of fact?
2. Did the Second Circuit Court of Appeals err in its interpretation of Fed.R.Evid. 804(b)(3), 804(b)(1) and Fed.R. of Crim. Pro. 11(e)(6) and did it do so in a manner which denied petitioner the exercise of his Sixth Amendment right to confront the testimony of the witness against him?
3. Did the Second Circuit Court of Appeals err in its ruling that exculpatory material withheld from the defense by the Government was not basis for reversal since it did not meet the reasonable probability standard of this Court.

LIST OF PARTIES

The parties to the proceeding in the Court whose judgment is sought to be reviewed are the United States of America and Steven Cinnante and Jorge Serna, the defendants below.

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 25, 1986 and a Petition for Rehearing en Banc was timely filed. The Petition for Rehearing en Banc was denied and a judgment entered on November 3, 1986, and this Petition for Certiorari was filed within sixty (60) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Sixth Amendment, United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. The statutes involved in consideration of this case are Federal Rules of Evidence 702, 804(b)(1), 804(b)(3), 609(a) and 403 and Fed.R. of Crim.Pro. 11(e)(6), reproduced in the appendix hereto.

STATEMENT OF THE CASE

On June 26, 1985, after trial in the United States District Court, Eastern District of New York, Steven Cinnante was convicted of violating Title 21, United States Code, Section 841(a)(1) for having conspired to import marijuana from Columbia, South America, to the United States in April, 1984. He was also found guilty of the second count of the Indictment filed against him, a charge of possession with an intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2(A-16-18)*. He is presently serving concurrent terms of 10 and 12 years, respectively, on each count.

The Government established its case against Cinnante through the testimony of co-conspirator Marco Castellon. Castellon had a history of large-scale cocaine transactions and when he was arrested in relation to that conspiracy underlying Cinnante's con-

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*Numbers in parentheses preceeded by "A" refer to pages in the appendix filed with the Second Circuit Court of Appeals.

viction, he quickly agreed to testify against alleged co-confederates Kenneth Chupurdy, Jorge Serna and Steven Cinnante.

The gist of Castellon's testimony against Cinnante lay in his accusation that the planned sale and transport of drugs from South America to the United States had been finalized at a meeting held at a House of Pancakes Restaurant in Hollywood, Florida. It was there, Castellon said, that he met a man named Steven whom he later identified as Cinnante (A-770). Plans for the distribution of the drugs, which had cleared United States customs by the time of the meeting, were made and Castellon was instructed to pick up and transfer the marijuana shipment to co-defendant Kenneth Chupurdy who had been hired to drive the goods to their ultimate destination in Philadelphia (A-771, 772).

The scheme was aborted, however, when federal customs agents discovered the truck's contents, leading to the immediate arrest of Castellon and Chupurdy. Quickly deciding to align his interests with those of the prosecution, Castellon told of meeting the fair-haired "American man," whom he ultimately identified through photo arrays, as Steven Cinnante.

Certiorari is necessitated in this case given the lower courts' blithe disregard of the stated, specific legislative intent behind the Federal Rules of Evidence. Each of the particular statutes involved — namely Fed.R.Evid. 804(b)(3), 804(b)(1), 702 and Fed.R.Crim.Pro. 11(e)(6) was interpreted in a manner directly contrary to the legislative plan espoused. Such wrongheaded judicial independence should not go unnoticed by this Court.

Since the inception of this case, Cinnante has doggedly proclaimed his innocence, insisting throughout that Castellon misidentified him. At every turn, however, the defendant was foreclosed from bringing to the jury's attention those facts which would have concretely bolstered his defense. He was not allowed to introduce an expert in identification who would have explained to the jury the sometimes surprising difficulties in identification

perception and recall. He was not allowed to introduce the exculpatory statements of two codefendants, Jorge Serna and Kenneth Chupurdy - both of whom exonerated Cinnante; nor did he have the benefit of equally exculpatory evidence, known by the Government but discovered by Cinnante only after trial. That evidence consisted of the information that a white male (whom even the Second Circuit acknowledged strongly resembled Cinnante) had contacted Chupurdy under circumstances indicating that this man and not Cinnante was the individual whom Castellon had met in Florida.

A grant of Certiorari would not merely provide a forum for explication of those federal rules, which have caused much litigation and conflict among the Circuits, but would also allow the petitioner a further and merited review of his case. The issues petitioner wished presented to the jury were based on undisputed facts: the exculpatory statements and the existence of the lately identified male in contact with Chupurdy. That they were withheld from the trier of fact puts into question not only the correctness of the jury's verdict, deprived as it was of these essentials of the defense case, but also the defendant's ability to adequately confront the witness against him. The interplay between the Federal Rules and the Sixth Amendment finds voice in this case and thus petitioner respectfully requests that Certiorari be granted.

REASONS FOR GRANTING THE WRIT

I

THE SECOND CIRCUIT'S RULING THAT TESTIMONY OF AN IDENTIFICATION EXPERT WAS INADMISSIBLE UNDER RULE 702 SINCE IT WAS NOT BASED UPON PERSONAL KNOWLEDGE AND BECAUSE IT COINCIDED WITH THE "COMMON EXPERIENCE" OF THE TRIER OF FACT IS IN CONFLICT WITH THE FEDERAL RULES OF EVIDENCE AND THE OPINION OF THIS COURT.

The scope of Rule 702 was directly addressed by this Court in *Barefoot v. Estelle*, 463 U.S. 880 (1983), holding that expert testimony is admissible whether or not founded upon the expert's personal knowledge of the underlying events. The Second Circuit has disregarded that ruling, holding to the contrary that the opinion of an expert in identification and recall is inadmissible unless based on personal knowledge.

Steven Cinnante was implicated in the crimes charged through the testimony of Marco Castellon, an unindicted coconspirator. Upon arrest by DEA Agents, Castellon agreed to cooperate with the Federal authorities, advising them that the planned sale of drugs had been discussed at a meeting at the House of Pancakes Restaurant in Hollywood, Florida (A-198). At that rendezvous, Castellon, himself a native of Nicaragua, spoke of meeting an American man, whom he ultimately identified as Cinnante. Castellon posited that the man was 35 to 40 years old, weighing approximately 200 pounds and standing between 5'10" and 6'2" tall with dirty blond hair, a mustache, blue eyes and "very nice teeth" (A-199).

Based on the description given, a photo spread was arranged, Cinnante's picture being the only photograph in the array which had been copied from a driver's license. Castellon made a tentative selection of Cinnante's picture, remarking that he was unsure in his choice and that the man whom he had met was older, had a mustache and blond hair (A-225, 226). In an attempt to solidify his identification, Castellon was given permission to draw a mustache on Cinnante's picture (A-226); still his identification remained a tentative one (A-227). Some months later the DEA compiled two more photographic spreads. The first set of photographs contained no picture of Cinnante and Castellon identified no one as being or resembling the man he had met some six months earlier (A-230). However, after perusing the second set of pictures, Castellon asked for the first photo spread. Comparing these, Castellon identified Steven Cinnante, the only person whose pictures was repeated in the later spread, as his alleged coconspirator (A-231).

The basis of Steven Cinnante's defense was his consistent claim that Marco Castellon had misidentified him as the man attending the conspirators' breakfast and participating in the ensuing drug transaction. To bolster that defense and give it credibility with the jury, he sought to introduce the testimony of Robert Buckhout, a noted researcher in the field of eyewitness identification.

After an *in limine* hearing, the trial court ruled that the proposed testimony was to be excluded (A-1461) and averred that the expert's testimony was being offered in a vacuum since he was not personally familiar with the particulars of the identification (A-1462). The Court of Appeals upheld that determination, finding no abuse of discretion. Because the decisions of the lower courts are at odds with this Court's opinion in *Barefoot v. Estelle*, 463 U.S. 880 (1983), and because they are part of a continuing but wrongheaded approach to interpretation of the relevant federal rules, petitioner seeks a grant of certiorari.

The Second Circuit disallowed Buckhout's testimony because:

> "The expert here was ignorant of the conditions under which Castellon identified Cinnante's photograph and his proposed testimony basically consisted of general pronouncements about the lack of reliability of eyewitness identification; particularly cross-racial identification. He also acknowledged that many of his conclusions coincided with common sense" (Ap-16)*.

As noted *infra*, the trial court had denied Buckhout's testimony for similar reasons, classifying it as evidence offered in a vacuum (A-1462).

In excluding the evidence on the basis that Dr. Buckhout was not personally aware of details of Castellon's identification, the courts below have espoused criteria directly contrary to the letter and spirit of Rule 702. The error of law should be corrected by this Court before the intent which fostered the statute is irreparably subverted.

In *Barefoot v. Estelle*, *Id.*, the petitioner had argued that under the Federal Rules of Evidence, expert psychiatric testimony on the issue of future dangerousness was inadmissible unless based on the physician's personal examination of the defendant. This Court held otherwise, stating:

> "Expert testimony, whether in the form of an opinion based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the fact finder do its assigned job" (*Id.* at 903).

The Court quoted from *Spring Co. v. Edgar*, 99 U.S. 645 (1879):

> " 'Such opinions ought, in general, to be deduced from facts that are not disputed, or from facts given in evidence; but . . . they need not be founded upon their own personal

*Numbers in parentheses preceeded by "Ap" refer to the Appendix to this Petition.

> knowledge of such facts but may be founded upon the statement of facts proved in the case' " (*Barefoot, Id. at 903).*

Consistent with that declaration is the language of Rule 702 itself which states explicitly that the expert may testify in the form of an opinion "or otherwise". The Advisory Committee notes expound upon the statutory language explaining that: "The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts" (Notes of Advisory Committee on proposed Rule 702).

Indeed, that a dissertation on the subject may be the more appropriate means of utilizing the expert's testimony has been the subject of scholarly commentary:

> "Unlike other expert witnesses, who assess particular evidence in the record, experts on eyewitness identification attempt to bolster the jury's own ability to assess the evidence. In order to carry out this informative function, their testimony need only relate the results of studies, the methodologies involved, and, perhaps, some general comments on the applicability of those studies to the 'real world'. The eyewitness expert thus more resembles a Judge giving jury instructions than a psychiatrist commenting on the credibility of a particular defendant. This distinction is important; some Courts holding such testimony inadmissible apparently have ignored it." Walters, Christopher M., "Admission of Expert Testimony on Eyewitness Identification," 73 Cal.L.Rev. 1402, 1406 (July, 1985).

That Dr. Buckhout had no personal knowledge of the facts of the identification; i.e., that he was not physically present, did not foreclose his testimony either in response to hypotheticals (which defense counsel proposed to use [A-1464]) or predicated on his more general exposition of the weaknesses in eyewitness identification. Grounding a denial of the evidence on that basis was clearly erroneous.

Likewise misguided was the courts' conclusion that much of what Dr. Buckhout was prepared to testify to "coincided with common sense" (Ap-16). Not only is that factually incorrect* but it effectively works to foreclose the admission of any expert testimony on memory, perception and identification. To determine that exposition of an individual's perceptions and recall of those perceptions are matters of common knowledge, since we presumably have all had the experience of identification, is incompatible with Rule 702. Petitioner's objection in this regard was thoughtfully discussed in *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), which held that the testimony should be admitted if it is helpful in explaining evidence that is difficult, although not beyond the ken of the juror. The Court agreed with the defense proposition that otherwise expert testimony of this type would always be barred from the jury (*Id.* at 1229).

Moreover, the federal rules themselves have broached the tendency of the Courts to exclude expert testimony on the interchangeable ground that it usurps the province of the jury. Citing this objection to oftentimes be no more than "empty rhetoric" the Legislature passed Rule 704 which specifically provides that the testimony is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. The Advisory Committee notes state bluntly:

> "The basic approach to opinions, lay or expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called 'ultimate issue' rule is specifically abolished by the instant rule" (Notes on Advisory Commit-

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*Dr. Buckhout wished to address the invalidity of an identification which permits the test-taker to control the process by editing the photos. He also discussed the repercussions of cross-racial identification and the fallacies that stress increases the reliability of an eyewitness identification and that the eyewitness who is positive in his identification tends to be more accurate. These matters are not necessarily declarations of common knowledge — indeed, the latter two propositions run contrary to what the public commonly believes (A-1401-1423).

tee to proposed Rule 704).

Based on this wealth of unequivocal legislative intent, the statutory language itself and the Court's reiteration of that intent in *Barefoot v. Estelle*, supra, certiorari is advisable. Its grant would enable petitioner to argue the injustice of his conviction. At the same time, certiorari would clarify the proper utilization of Rule 702, the interpretation of which has resulted in a clear divergence of opinion among the Circuit Courts of Appeal. Several Courts have opted for the very restrictive approach discussed, opining, for instance, that the jury can adequately weigh eyewitness perception and identification through cross-examination and common sense evaluation. *See, United States v. Thevis*, 665 F.2d 616, 641 (5th Cir.) *cert. denied*, 459 U.S. 825 (1982) and *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979), both followed by the trial court herein (A-1460) *See*, also, *United States v. Brown, 540 F.2d 1048, 1054 (10th Cir.) cert. denied*, 429 U.S. 1100 (1977) and *United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973).

However, these rulings run contrary to the opinions expressed in cases such as *United States v. Downinq*, *supra*, and *United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986), which cite such readings as being in contravention of the broad mandate of "helpfulness" of Rule 702. *See*, also, *United States v. Smith*, 736 F.2d 1103 (6th Cir.) *cert. denied*, ____U.S.____, 105 S.Ct. 213 (1984); *People v. McDonald*, 37 Cal.2d 351, 208 Calp.Rptr. 236, 690 P.2d 709 (1984); *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983).

Explication from the Court as to the proper usage of Rule 702 would serve to heal the widening rift among the Circuits as to the limits of expert testimony and would stem the apparently increasing tide of litigation in this area.

II

THE SECOND CIRCUIT ERRED IN ITS INTERPRETATION OF FEDERAL RULES OF EVIDENCE 804(b)(3) AND 804(b)(1) AND FEDERAL RULE OF CRIMINAL PROCEDURE 11(e)(6) AND DID SO IN A MANNER WHICH DENIED PETITIONER THE EXERCISE OF HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION.

A. Fed.R.Evid. 804(b)(3) and Fed.R.Crim.Pro. 11(e)(6)(D)

After arrest and during questioning by a DEA Agent, co-defendant Jorge Serna made remarks exonerating Steven Cinnante of any illegality, advising the DEA that Cinnante was the "wrong man. Cinnante had nothing to do with it" (A-435). Apprised of the statement, defense counsel sought its admission under Federal Rules of Evidence Rule 804(b)(3). The trial court denied the motion, ruling in part that the statement was barred under Fed.R.Crim.Pro. 11(e)(6) precluding use of statements made by a defendant in the course of plea discussions with an attorney for the Government. The Second Circuit affirmed the ruling holding that although no Government attorney had been present during the meeting between Serna and the federal agents, physical presence was not a prerequisite where the agents themselves had been authorized to engage in plea discussions.

Petitioner seeks the Supreme Court's review of that ruling since it results in the expansion of Rule 11(e)(6) beyond its intended and judicially delineated boundaries, thereby creating a conflict among Circuits as to the proper scope of the rule.

In *United States v. Stirling*, 571 F.2d 708, 731 (2d Cir.), *cert. denied* 439 U.S. 824 (1978), the Court gave voice to the recognition that the drafters of Rule 11(e)(6) intended to slate as inadmissible only the fairly formal plea discussions between the United States attorney and defendant's counsel. The Eighth Circuit, in

United States v. Grant, 622 F.2d 308 (8th Cir. 1980), applauded that approach, explicitly rejecting the expansive interpretation of the statute accorded it by the Fifth Circuit in *United States v. Herman*, 544 F.2d 791 (5th Cir. 1977).

While *Grant* carved an exception to the requisite that a Government attorney be present during plea negotiations, it did so only in a situation where the federal agent had been expressly empowered by the Assistant United States Attorney to make a specific plea bargain offer, a circumstance which the Court noted to be highly unusual (*Id.* at 314). The limited use to which the Eighth Circuit intends to put this exception, is underscored in its more recent holding in *Rachlin v. United States*, 723 F.2d 1373 (8th Cir. 1983), which reiterates that *Grant* is inapplicable where the agents were not relaying a specific prosecution offer (*Id.* at 1376). Under that circumstance, the Agent cannot be deemd to be acting as the Government attorney's representative. The decisions in Rachlin and *United States v. Cinnante*, in particular, are current indicators that the contours of Rule 11(e)(6) are in question and that guidance from the Supreme Court would be appropriate.

B. Fed.R.Evid. 804(b)(1)

In conjunction with his argument that Serna's declaration was crucial to his defense, Cinnante also sought the introduction of the prior testimony of Kenneth Chupurdy. The role of Chupurdy, as framed by the Government, was that of driver of the marijuana from the ports of New York to the distribution point of Philadelphia. According to Castellon, who also testified for the Government at Chupurdy's trial,* Chupurdy had been present, along with Cinnante and Serna at the House of Pancakes meeting.

However, consistent with Cinnante's defense of misidentification, Kenneth Chupurdy testified at his own trial that he had never been a participant in any such meeting, nor did he know

*The transcript of *United States v. Chupurdy* was part of the joint appendix filed with the Second Circuit Court of Appeals.

Steven Cinnante (5A-66).* He claimed that he had met with Castellon on one occasion to discuss what he thought was a shipment of furniture, not drugs (SA-62, 67).

Because Chupurdy relayed, through his attorney, that he would invoke the Fifth Amendment if subpoenaed to testify at Cinnante's trial, the trial court ruled him an unavailable witness. Nonetheless, the court denied the defendant's bid to introduce his prior testimony under Rule 804(b)(3). The Second Circuit upheld the decision holding that, as required by the statutory language, the Government had not had a motive to cross-examine Chupurdy in the manner it would have employed upon his cross-examination at Cinnante's trial, had Chupurdy been available. The Second Circuit reasoned that, although Castellon's credibility was a key issue in Chupurdy's trial, the prosecutor wisely chose to focus his cross-examination on the incredibility of Chupurdy's claim of ignorance of the contents of the transport.

Petitioner submits that the question before the courts below was more properly, as required by the statute, whether the Government had "similar motive" to develop the earlier testimony, not whether its trial strategy compelled it to take a slightly different approach with the witness. The Second Circuit conceded that the Government had every reason to closely question Chupurdy about the House of Pancakes meeting — Castellon's credibility being the crucial issue that it was (Ap-15). That the respondent herein chose not to avail itself of the opportunity should not have foreclosed the defense from the benefit of the evidence. Were the statute to be so tightly circumscribed, it is submitted that the Legislature would accordingly have employed a more constricting phraseology.

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*The transcript of *United States v. Chupurdy* was part of the joint appendix filed with the Second Circuit Court of Appeals.

The Court of Appeals also advocated the trial court's conditioning of the admission of Chupurdy's testimony on the defendant's agreement that the jury be advised by the court that Chupurdy had been convicted.

The Court reasoned that, since Fed.R.Evid. 806 permits impeachment of the declarant's credibility by any evidence which would be admissible for those purposes if declarant had testified as a witness, proof of Chupurdy's conviction was proper under Rule 609(a). Because that statute only authorizes a balancing of probative value against prejudice to the declarant, the Second Circuit did not consider the prejudicial impact of Chupurdy's conviction on Cinnante.

Certiorari is sought as to the issue so that the Court might consider the question of prejudice to Cinnante in relation to Rule 403, allowing the exclusion of *any* relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. There has been no authoritative guidance on the interplay between 403 and 609(a). (See *Christmas v. Sanders*, 759 F.2d 1284 [7th Cir. 1985]) and explication from the Court would be appropriate.

Secondly, the trial court not only made admission of the evidence conditional but it forced defense counsel to stipulate to admission of the fact of Chupurdy's conviction (A-1466). Petitioner's right to present exonerating evidence should not be part of a negotiation process; nor should the trial court be permitted to inform the jury of the declarant's conviction, thereby acting as an arm of the prosecution. Whatever the rightful interplay between Rules 609(a) and 403, such unseemly and prejudicial trial tactics should not be silently condoned.

III

THE SECOND CIRCUIT ERRED IN ITS RULING THAT EXCULPATORY MATERIAL, SPECIFICALLY REQUESTED BUT WITHHELD FROM THE DEFENSE, WAS NOT BASIS FOR REVERSAL SINCE IT DID NOT MEET THE "REASONABLE PROBABILITY" STANDARD OF THIS COURT.

Petitioner also asks the Court to consider the constitutional implications of the Government's failure to inform defense counsel that, on the date that co-conspirator Kenneth Chupurdy was arrested, he had received a telephone call from an individual who referred to himself as "BJ". The telephone message slip, found in the motel room Chupurdy used to await word that the drug transport was ready for shipment, contained the name "BJ" and telephone number 766-4177.

Petitioner argued below that the message slip constituted favorable evidence which should have been released under the auspices of *Brady v. Maryland*, 373 U.S. 83 (1963). Defense counsel was able to verify that the number given was the beeper number of one Benjamin Weinstein of Boca Raton, Florida (A-172), (the alleged site of the conspirators' agreement and, according to Castellon, the residence of the American man whom he met [A-199]) and whose picture, provided by the defense, proved him to fit the description offered by Cinnante. The defendant also established, through documented hotel records, that Weinstein had been in California at the very time Castellon was awaiting final instructions from the "American man" who was to be contacting him from California (govt. Ex. 6A-6E). Conceding that there was a considerable resemblance between Cinnante and Weinstein and that the argument had interesting dimensions (Ap-11), the Second Circuit nevertheless held that since the evidence was not exculpatory, the Government was not obliged to tender it to the de-

fense (Ap-12) even though a specific request for such evidence had been made pre-trial.

Petitioner submits that that ruling undercuts both *Brady* and *United States v. Baqley*, ____U.S.____, 105 S.Ct. 3375 (1985). Certainly, any message forwarded to a suspect engaged in the secretive business of drug sales would be deemed potentially significant as uncovering a confederate to the illegality. Most assuredly, those outside the inner circle of crime would not be privy to Chupurdy's whereabouts on such an occasion. Given Cinannte's immediate response to the Government that Castellon had identified the wrong man, the Government presumably would have recognized the potential significance of the evidence and should be held to that level of understanding. Its responsibility to supply the favorable evidence was even greater, given the specificity of the defense request for all papers taken from co-defendant (A-28). Under such circumstances "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. See *United States v. Agurs*, 427 U.S. 97 (1976).

The Second Circuit was equally unresponsive to petitioner's argument that he had met the "reasonable probability" standard of *United States v. Bagley*, *supra*, that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bagley*, 105 S.Ct. at 3384. The Second Circuit's failure to employ a more judicious weighing of the jury's assessment of defense claims in light of the "BJ" information discounts this Court's caveat in Bagley that the standard of appellate review is a flexible one, designed to permit the reviewing Court to "assess the possibility that such [adverse] effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been mislead by the prosecutor's incomplete response" (*Id.* at 3384).

The Second Circuit chooses to disregard that monition and thus it failed to give due credence to the defendant's ability, had it had the favorable and requested evidence, to convince a jury that Castellon may have singled out the wrong man. That disturbing possibility should be studied by this Court; first, so that a just result might ensue and also so that further and necessary explication of the Bagley opinion may be undertaken.

CONCLUSION

For these reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1202, 1223 — August Term, 1985

(Argued May 2, 1986 Decided Aug 25 1986)

Docket Nos. 86-1003, 86-1008

United States of America,
Appellee,

v.

Jorge Serna and Steven John Cinnante,
Appellants.

United States Court of Appeals
Filed Aug 25 1986
Elaine B. Goldsmith, Clerk
Second Circuit

Before FEINBERG, *Chief Judge*, LUMBARD, and OAKES, *Circuit Judges*.

Appeals from judgment of conviction entered by the United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., *Judge*, for conspiracy and substantive offenses related to importation, possession, and distribution of marijuana, and conspiracy to possess and distribute cocaine. Claims of trial court error in excluding hearsay statements and expert testimony, admitting a drug ledger, and denying a new trial based on newly discovered evidence rejected; evidence sufficient.

Judgment affirmed.

Lawrence M. Malman, P.A., Coral Gables, FL (Stephen Golembe, Mishkin & Golembe, Miami, FL, of counsel), *for Appellant Jorge Serna.*

Paul J. Cambria, Jr., Buffalo, NY (Mary Good, Lipsitz, Green, Fahringer, Roll, Schuller & James, of counsel), *for Appellant Steven John Cinnante.*

Ephraim Savitt, Brooklyn, NY (Reena Raggi, United States Attorney, Eastern District of New York, Allyne R. Ross, Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

Appellants Jorge Serna and Steven John Cinnante appeal their convictions following a jury trial in the United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., Judge, in connection with the importation into the United States from Colombia of 4,920 pounds of marijuana in March of 1984 and the distribution of cocaine. Count One of the indictment charged Serna and Cinnante with conspiring to import, possess, and distribute marijuana and to possess and distribute cocaine in violation of 21 U.S.C. § 846 (1982); Count Two charged Serna with directing the importation of the marijuana in violation of 21 U.S.C. §§ 952(a), 960(a)(1) (1982) and 18 U.S.C. § 2 (1982); Count Three charged both Serna and Cinnante with the crime of possession of marijuana with the intent to distribute it in violation of 21 U.S.C. § 841(a)(1) (1982) and 18 U.S.C. § 2. Each defendant was found guilty on all counts charged. Judge Platt sentenced Serna to concurrent twelve-year terms of imprisonment on Counts One and Two and a concurrent five-year term on Count Three, to be followed by concurrent lifetime special parole terms, as well as a cumulative fine of $65,000; Cinnante was sentenced to a twelve-year prison term on Count One and a concurrent ten-

year prison term on Count Three, to be followed by a concurrent lifetime special parole term, and a cumulative fine of $80,000. Appellants challenge four evidentiary rulings of the trial court. Cinnante also claims that the evidence was insufficient to support his conviction and that the trial court should have granted his motion for a new trial on the basis of newly discovered evidence. We affirm.

BACKGROUND

On March 13, 1984, United States Customs inspectors at the Brooklyn seaport discovered sixty-eight bales of marijuana weighing about two and one-half tons secreted inside a false compartment of a shipping container loaded with furniture that arrived aboard a vessel from Colombia. According to the ship's manifest, the furniture was destined for a Marco Castellon at a Corona, Queens, address. Customs and Drug Enforcement Administration ("DEA") officials removed the marijuana from the container, except for a small quantity deliberately left inside the false compartment. The furniture was placed back into the container, which was left on the Brooklyn waterfront to be claimed in the normal course by a customs broker. On March 29, Atlantic & Pacific Transport, Inc. ("A&P"), a brokerage firm, effected customs clearance for the container and transported it by truck to its lot in Queens. A&P personnel advised DEA agents that someone would arrive on April 2, 1984, to transport the container.

On the morning of April 2, Kenneth Neal Chupurdy drove a tractor to the A&P lot; shortly thereafter, Marco Castellon arrived at the A&P offices. After Castellon completed payment, Chupurdy hooked up the container to his tractor and, followed by surveillance agents, drove to a truck stop in South Kearney, New Jersey. Castellon took a taxi from A&P to LaGuardia Airport and was arrested as he was about to board a flight to Florida. Agents stopped Chupurdy after he was observed driving away from the truck stop in his tractor without the container and then arrested him as a result of information Castellon provided to the DEA fol-

lowing his arrest. Thereafter DEA agents, pursuant to a search warrant, obtained a black bag belonging to Chupurdy from a New Jersey motel where he had been registered at the time of his arrest. Inside the bag was a telephone address book with various names and numbers, including the name "Cinnante [*sic*]" without any first name, telephone number, or address.

Castellon agreed to cooperate immediately following his arrest. He did so and eventually testified at trial. Castellon advised the DEA agents that the marijuana importation scheme had been conceived and directed by Jorge Serna and by a man named "Steven," whose last name Castellon did not know. Castellon described Steven as about thirty-five to forty years old, between five feet ten inches and six feet two inches tall, about 200 pounds, with dirtyish blond hair, a moustache, blue eyes, and "very nice teeth." He stated that Serna had recruited him to act as consignee for the container for $50,000, and provided details of the importation scheme.

During the previous few months Castellon had purchased some five kilograms of cocaine from Serna on a consignment basis for resale, for which he owed Serna about $20,000. On several occasions in late 1983 and early 1984, Castellon, when delivering sums of money to Serna for cocaine, observed Serns making notations in a black notebook or ledger comprised of entries for various customers. Customers were designated by a code name or first name, and a detailed balance sheet for each customer recorded deliveries of kilograms of cocaine, payments made and balances due; a separate section listed accounts in Miami and Bahamian banks.

With respect to the marijuana container, Serna gave Castellon the bills of lading and other necessary documents and instructed him to travel to New York and hire a customs broker to handle the customs clearance. Castellon made three trips to New York in March 1984, retained the A&P brokerage firm, and paid for its services with money that Serna provided. A&P reported delays and during one of the trips Castellon telephoned Serna, who ad-

vised him than an "American gentleman by the name Steven" would call him at his hotel to ask about the delays. A few minutes later, Castellon received a telephone call from a man who identified himself as Steven and asked Castellon questions about the lack of progress in clearing the container.

On March 29, 1984, Serna and Castellon met in a Miami restaurant to discuss the delays. Serna remarked to Castellon that his "American friends will not believe him any more." He also confided that "this gentleman Steven. . .has the customer for this marijuana" and remarked that they would now refer to Steven as "John." Later the same day, A&P cleared the container and told Castellon he had to collect it from the lot as soon as possible. After learning of this news, Serna told Castellon to go to a House of Pancakes restaurant in Miami the following morning to meet Steven and Steven's truckdriver. At the restaurant Serna introduced Cinnante to Castellon only as "Steven"; Chupurdy was identified simply as the truckdriver. Cinnante sat down next to Serna and accross from Castellon and Chupurdy, about two to three feet from Castellon. Because of language difficulties Castellon, who spoke both English and Spanish, acted as interpreter. Castellon reported to "Steven" that A&P wanted the container moved from its lot "as soon as possible" because of a recent snowstorm. Discussing transportation, Cinnante told Serna that, before delivering the marijuana to the customer in Philadelphia, he planned to leave the container overnight in a rest area in New Jersey to "see if the feds are watching." He explained that on a prior occasion the container was found to be "full of bugs," i.e., electronic devices. Serna told Cinnante that it was "good" to have snow covering the container because "that way the marijuana will not smell." Castellon, hesitant to use the word "marijuana" in a public place, incongruously used the word "pot" to convey this message in English. Cinnante remarked to Serna that "you will not believe how fast you're going to get your money." Serna replied that "money is the last thing [I'm] worried about." He

stressed that he wanted Steven to be in Philadelphia when the deal was consummated to avoid dispute about the quantity and quality of the merchandise.

At this stage in the House of Pancakes conversation, Serna and Cinnante began to speak about other transactions. Serna asked, "[H]ow about a little money[?]" and Cinnante replied that he could probably get $50,000 or $75,000. Serna and Cinnante also discussed Serna's recent purchase of a DC-3 airplane, which was ready for a "test flight down there." Serna told Cinnante that he "must not forget that next week they have [another] container coming into San Francisco." The entire conversation lasted about thirty to thirty-five minutes.

After the meeting, Castellon asked Serna whether he was sure that "Steven" and the truckdriver were not "policemen." Serna assured Castellon that "Steven," who resided in the Boca Raton area, was a longstanding business associate in cocaine trafficking who owed Serna $800,000 for cocaine already delivered and was asking for more cocaine.

Castellon also cooperated after his arrest by telephoning Serna while DEA agents tape-recorded the conversation. In all, seven such telephone conversations in Spanish were recorded. Using a cover story provided by the DEA agents, Castellon told Serna that he was still in New York because he had missed his flight as a result of a weapons check by airport police. Castellon asked Serna whether he had spoken to "Steven." Serna responded, "No, I'm waiting for him to call me," and suggested that the airport stop "could be a coincidence." The following day Serna informed Castellon that he learned from "John" that the "chauffeur was in jail" and added that it was "strange" for Castellon not to have been arrested. Serna also instructed Castellon that if he was caught he should claim lack of knowledge about the marijuana and assert that a fictitious Pedro Gonzalez had hired him to act as consignee. Serna promised to provide a lawyer for Castellon's de-

fense, admonished him to be loyal and discreet, and warned him that "everything is going to get complicated" if he revealed that Serna was the marijuana's owner.

Later that day, Serna informed Castellon that "John" was accusing Castellon of cooperating with the authorities, whereas Serna had told "John" that he was "leery of. . .his chauffeur," who Serna suspected was involved in a scheme to "rip off" John. Serna added that he believed that the "chauffeur" had cooperated with the authorities because "that stuff [was] welded together very well." In relating his conversations with "John," Serna several times referred to John as Steven, at one point immediately correcting himself.

On April 4, 1984, DEA agents, armed with an arrest warrant for Serna, accompanied Castellon to Miami. Castellon telephoned Serna's beeper and in two recorded conversations advised Serna that he had returned to Miami and wished to meet with him to obtain more money. Serna demanded to know about Castellon's "balance with me for twenty," an apparent reference to the $20,000 Castellon owed for cocaine delivered. Although Serna told Castellon to call back to set up a meeting, Castellon's subsequent calls to Serna's beeper went unanswered.

On April 6, Nubia Serna, Serna's wife, left their residence in Key Biscayne and drove to the parking lot of a Burger King restaurant in Miami where she gave two men an attache case and a shopping bag. DEA agents who had her under surveillance stopped the men, who handed over the attache case, a black notebook, and the shopping bag, which contained men's clothing. Looking in the black notebook, one of the agents recognized it as a narcotics ledger reflecting large-scale cocaine transactions. Upon opening the attache case, the agents discovered numerous items of identification with Serna's name and photograph, a card containing the beeper number that Castellon had dialed to contact Serna for the agents, and a handwritten list containing names and telephone numbers identical to some of those found in the black

ledger. The two men told the agents that all of these items "belonged to Mr. Serna." An analysis of the ledger revealed that it recorded deliveries of more than 200 kilograms of cocaine between April 1983 and March 1984 to twenty-one major customers for which the customers had already paid approximately $5 million, with several million dollars still outstanding. Serna was finally located and arrested on June 26, 1984. In his possession were several identification documents, all in a false name.

DEA Group Supervisor Raymond Tripicchio decided that the defendant Steven John Cinnante, who resided in the Boca Raton area, was likely the "Steven" Castellon had met. The agent obtained a copy of Cinnante's 1980 driver's license bearing his photograph, which showed Cinnante to have dark hair and no moustache. He reproduced that photo and showed it in a photograph array of seven other clean-shaven men to Castellon. Castellon said that Cinnante's photograph "look[s] very much like. . .Steven," but declined to make a positive identification because the man pictured had no moustache, had darker hair, and appeared to be younger than "Steven." At Castellon's suggestion, he drew a moustache on a copy of Cinnante's photo, stating that it "looks like. . .this Steven that I have met in the House of Pancakes," but he could not be "totally sure" without seeing a "better picture." Thereafter, Tripicchio obtained a copy of Cinnante's May 1984 driver's license, which had a photo of him with light brown hair and a full moustache. The agent then prepared a photographic array comprised of ten photos, including Cinnante's, of moustached men with some similar facial features. He also prepared a photo array that did not include Cinnante; it consisted of ten men without moustaches, one of whom was a subject of a DEA investigation and named Steven. Castellon recognized none of the photographs in the latter array. After looking for about ten minutes at the former photo array, he asked for the photo array from July, compared the two, and identified Cinnante's recent and earlier

photos as "Steven." Cinnante was arrested on September 25, 1984.

On June 17, 1985, the date of jury selection, Castellon went to the courthouse cafeteria and joined the long line of people waiting to buy lunch. As the man ahead of him turned, Castellon was "shocked" to see that he was "Steven." Castellon had believed "Steven" was in jail. Castellon testified that "he looked at me very angry," and Castellon looked away from the "twin representation of Steven." That individual, however, repeatedly turned around, looked angrily at him and then spoke with intermittent nervous laughter to the woman who accompanied him. The man in line ahead of Castellon was Cinnante.

Neither defendant testified, the principal defense focusing on Castellon's credibility, and especially on his admitted cocaine involvement and his cooperation agreement.

DISCUSSION

Although Cinnante does not challenge on appeal the denial of the motion to suppress Castellon's photo identification, his appeal rests in large part on the assertion that the identification was unreliable. We therefore address first Castellon's identification of Cinnante. We point out that we have examined the photo arrays and the various photographs in this case. These photo arrays are not overly suggestive and the trial court's denial of the suppression motion was proper. Before he saw the photos, Castellon's physical description of Cinnante was an accurate one — about six feet tall, light colored hair, thick moustache, blue eyes, bright teeth. Castellon was within two to three feet of Cinnante for at least half an hour at the House of Pancakes. Remarkably, he was able to select Cinnante's 1980 photograph out of an array of eight clean-shaven people. The accuracy of Castellon's recollection is underscored by the fact that after drawing a moustache on a photocopy of that photo, he said that it looked like "Steven" but

would not make a positive identification because the photo depicted a younger man than the one he had met. When he saw an up-to-date photo of Cinnante in a non-suggestive array of ten, he identified it as "Steven," although he first compared the two arrays containing Cinnante's photo. There is no evidence that the cafeteria encounter was prearranged; not surprisingly Castellon was shocked to find himself standing behind the man against whom he was to testify. Moreover, it is a fact that Cinnante's first two names are Steven and John. While the taped conversations between Serna and Castellon were admitted only against Serna, they substantiate Castellon's testimony that the man he met at the House of Pancakes was known as "Steven" and "John." Thus, the possibility that Castellon was framing Cinnante, as Cinnante suggests in connection with his motion for a new trial, is remote at best.

Cinnante claims that his motion for a new trial based on newly discovered evidence was improperly denied. The newly discovered evidence relates to "Benji," whom appellant's counsel alleges to be Benjamin Lee Weinstein, a Boca Raton resident who has a moustache somewhat similar to Cinnante's. The Government recovered a telephone message slip in Chupurdy's New Jersay motel room noting that a "Benji" with the phone number 766-4177 had called him, apparently from San Francisco, on the morning of April 2, while Chupurdy was picking up the container. Chupurdy's address book, also confiscated by the DEA, contains the name Ben B. and the same number, which indeed is the beeper number of Mr. Weinstein.

All of these things are very interesting and there is a considerable resemblance between Weinstein and Cinnante, at least as the two men appear in their driver's license photographs, and as Weinstein appears in a photograph taken at a party with cocktail glass in hand. Unlike Cinnante, however, Weinstein does not match Castellon's original description of "Steven" as about six

feet tall with dirtyish blond hair; Weinstein appears to have darker hair and is about five feet eight inches.

Cinnante argues that if he had known of the message slip and had been able to locate "Benji" before trial he might well have created reasonable doubt in the mind of at least one juror. He claims that the Government's failure to turn over the message slip violated *Brady v. Maryland*, 373 U.S. 83 (1963). But *Brady* applies only to evidence favorable to the accused. *Id.* at 87. Prior to Cinannte's new trial motion, the Government, which had been unable to discover Benji's identity, simply had no basis to believe the slip had any relevance to this case. Moreover, in light of Castellon's certain identification of Cinnante, the appellant has failed to show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 105 S. Ct. 3375, 3384 (1985). Having failed to meet *Bagley's* "reasonable probability" standard, Cinnante also fails to meet the higher standard for a new trial based on newly discovered evidence — that the new evidence "would probably lead to an acquittal." *United States v. Gilbert*, 668 F.2d 94, 96 (2d Cir. 1981), *cert. denied*, 456 U.S. 946 (1982); *see also United States v. Alessi*, 638 F.2d 466, 479 (2d Cir. 1980).

We also reject appellants' claim that certain hearsay evidence was improperly excluded. Cinnante argues that he should have been permitted to offer into evidence Serna's comment to a DEA agent that Cinnante was the "wrong man." After a pretrial hearing Judge Platt found that this comment was inadmissibile under Fed. R. Crim. P. 11(e)(6)(D) because it was made in the course of plea negotiations. Whether a party is engaged in plea discussions is a factual question that must be determined on a case-by-case basis. *See United States v. Grant*, 622 F.2d 308, 312 (8th Cir. 1980). We have little difficulty in concluding that Serna had entered into plea discussions with the Government at the time he made the statement. Prior to trial, Serna and his retained counsel met with an Assistant United States Attorney and two DEA

agents to discuss the possibility of Serna's cooperation with the Government. General guidelines were discussed at this meeting, but Serna was not questioned on his role as a drug dealer. The AUSA indicated that statements made by Serna would not be used against him and Serna was informed that his cooperation would be made known to the sentencing judge, but that the cooperation had to be total. To determine Serna's sincerity in cooperating, a DEA agent interviewed him in the presence of his counsel. No Government attorney was present. Serna was less than forthcoming, although he did admit his involvement in importing the container. When asked about Cinnante's involvement, according to the agent, Serna shook his head and "may have said, you have the wrong person or indicated that no, no, you're talking about the wrong man." At this point the agent decided that Serna's professed cooperation was a sham and terminated the interview, and no further plea discussions were held. In light of the initial meeting with the AUSA, this preliminary discussion must be considered as part of the overall plea bargaining process. A requirement that such negotiations be more formal would contravene Rule 11(e)(6) by discouraging plea bargaining. *See United States v. Levy*, 578 F.2d 896, 901 (2d Cir. 1978); *see also Santobello v. New York*, 404 U.S. 257, 261 (1971). Although the rule prohibits use of statements only "against the defendant who . . . was a participant in the plea discussion," and the statement was sought to be admitted only in favor of a codefendant, if Cinnante had been allowed to introduce the statement into evidence there is a strong likelihood that the jury would have considered it as evidence against Serna. A limiting instruction would have been ineffective to protect Serna from the devastating impact of the statement that was tantamout to a confession. *Cf. Bruton v. United States*, 391 U.S. 123, 129 (1968). Of course, had Cinnante been tried separately from his codefendant, Rule 11 would not have prevented introduction of Serna's statement.

A somewhat more difficult question is raised by the absence of a Government attorney when the excluded statement was made, since Rule 11(e)(6)(D) requires that the statement be made "in the course of plea discussions with *an attorney* for the government" (emphasis added). The Notes of the Advisory Committee on Rules to the 1979 amendments indicate that the requirement of an attorney's presence was added to prevent the exclusion of statements made to Government agents when there has been no participation of a Government attorney. *See, e.g., United States v. Herman*, 544 F.2d 791 (5th Cir. 1977). We think the rule can be fairly read to require the *participation* of a Government attorney in the plea discussions, but not necessarily his physical *presence* when a particular statement is made to agents whom the attorney has authorized to engage in plea discussions. *See Grant*, 622 F.2d at 313. Because the agents were acting under the AUSA's authority in determining whether Serna would in fact cooperate, Serna's statement was properly excluded. We thus have no need to reach the Government's alternative contention that the statement was inadmissible under Fed. R. Evid. 804(b)(3).

Cinnante and Serna also argue that the trial judge erred in excluding hearsay evidence from the transcript of Chupurdy's testimony at his trial. Chupurdy had testified that he did not attend any meeting at the House of Pancakes and that he did not know either Serna or "Steven." The same Assistant United States Attorney prosecuted both Chupurdy and Serna and Cinnante, and Castellon testified in both trials about the House of Pancakes meeting. Appellants contend that Chupurdy's testimony fits within the hearsay exception of Fed. R. Evid. 804(b)(1). However, the rule requires that the declarant be unavailable as a witness and the Government have had an opportunity and similar motive to cross-examine the witness at the previous trial. Cinnante's counsel served Chupurdy with a trial subpoena, and Chupurdy indicated through his attorney that he would invoke the Fifth Amendment. Judge Platt apparently accepted the represen-

tation that Chupurdy was unavailable, although he held no hearing on this question. Because Castellon's credibility was a key issue in Chupurdy's case, the prosecutor arguably had a motive to cross-examine Chupurdy on his claim that he had not attended a House of Pancakes meeting. However, since cross-examination was unlikely to shake Chupurdy's denial of such a meeting, the prosecutor, wisely, we think, chose to focue his cross-examination on the details of Chupurdy's transportation of the container to show that his claim of ignorance of its contents was unbelievable, rather than to emphasize to the jury Chupurdy's denial of any House of Pancakes meeting. Thus, exclusion of Chupurdy's statements was not an abuse of the trial court's discretion since the prosecutor had no real motive to explore Chupurdy's earlier statements.

Judge Platt, however, did not categorically exclude the statements under Rule 804(b)(1). Instead, he offered to admit them conditioned on informing the jury that Chupurdy's "jury didn't believe him and found him guilty and he's doing five years in jail." Defense counsel rejected this offer. Under Fed. R. Evid. 806 the credibility of such hearsay "may be attacked . . . by any evidence which would be admissible for those purposes if [the] declarant had testified as a witness." Since the conviction cast doubt on the credibility of Chupurdy's statements, conditioning admission of that hearsay evidence on informing the jury of the conviction was not an abuse of discretion. *See, e.g., United States v. Noble*, 754 F.2d 1324, 1331 (7th Cir.), *cert. denied*, 106 S. Ct. 63 (1985).

Cinnante and Serna also claim that the trial court improperly excluded expert witness testimony proffered on Castellano's identification of Cinnante. We have carefully examined the expert's voir dire and find that the ruling was not clearly erroneous. *See United States v. Brown*, 776 F.2d 397, 400 (2d Cir. 1985). A trial judge is accorded broad discretion in admitting or excluding expert testimony under Fed. R. Evid. 702 and in excluding testimony under Fed. R. Evid. 403 because of the danger of jury con-

fusion or unfair prejudice. *See id.* at 400, 401 & n.6 (citing *United States v. Young*, 745 F.2d 733, 765-66 (2d Cir. 1984) (Newman, J., concurring), *cert. denied*, 105 S. Ct. 1842 (1985)). The expert here was ignorant of the conditions under which Castellon identified Cinnante's photograph and his proposed testimony basically consisted of general pronouncements about the lack of reliability of eyewitness identification, particularly cross-racial identification. He also acknowledged that many of his conclusions coincided with common sense. This court is fully aware of the dangers of testimony based purely on eyewitness identification, and we have often commented on those dangers. *See, e.g., Kampshoff v. Smith*, 698 F.2d 581, 585-86 (2d Cir. 1983). Nevertheless, we do not think that this expert's proferred testimony would have done anything other than to muddy the waters.

Given that Castellon's photo identification of Cinnante was properly admitted, Cinnante's sufficiency argument is without merit. The evidence shows that Cinnante was a broker for the sale of the two and one-half ton marijuana shipment, hired the truck-driver, directed the transportation, and set up the contemplated sale of the shipment; he was also a major concaine customer of Serna's and owed the latter $800,000 for cocaine delivered. This evidence is more than sufficient to uphold his conviction on the possession and conspiracy charges, given the appellant's very heavy burden on a sufficiency of the evidence claim.

Finally, Serna claims that the trial court improperly admitted the drug ledger in evidence against him. Although Jairo Perez, who handed over the drug ledger and who was carrying the briefcase filled with Serna's papers, did not testify at trial, Tripicchio testified that Perez told the agents that the ledger was Serna's and Castellon testified that he recognized it as Serna's because on several occasions he had seen it in Serna's possession when delivering money to Serna for previous cocaine deliveries. Indeed, Castellon identified a section in the ledger referring to "Marco" as the account of his own cocaine purchases. Under Fed. R. Evid. 901(a)

the Government "need only prove a rational basis from which the jury may conclude that the exhibit did, in fact, belong to the appellant[ ]." *United States v. Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). Here, the testimony of Tripicchio and Castellon made out a prima facie case connecting the exhibit to the defendant; the evidence was thus properly submitted to the jury for a determination on its authenticity. *See United States v. Goichman*, 547 F.2d 778, 784 (3d Cir. 1976). We think the ledger was duly authenticated and properly admitted.

Judgment affirmed.

1. Fed. R. Crim. P. 11(e)(6)(D) provides:

> Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 3rd day of November one thousand nine hundred and eighty-six

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UNITED STATES OF AMERICA,
Appellee,

-V-

STEVEN JOHN CINNANTE and JORGE SERNA,
Defendants-Appellants.

United States Court of Appeals
Filed Nov 3 1986
Elaine B. Goldsmith, Clerk
Second Circuit

Docket No. 86-1003
86-1008

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant — STEVEN JOHN CINNANTE,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

STATUTES INVOLVED

RULE 403 — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 609 — Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

RULE 702 — Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

RULE 804 — Hearsay Exceptions; Declarant Unavailable

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

RULE 11(e)(6) — Inadmissibility of Pleas, Plea Discussions, and Related Statements

(D) Any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false

statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

RULE 806 — Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, consistent with his hearsay statement, is not subject to any requirement that he may have been afforde an opportuniy to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statment as if under cross-examination.

EDITOR'S NOTE

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No. 86-1118

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STEVEN CINNANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding expert testimony on the reliability of eyewitness identification.

2. Whether the district court abused its discretion by excluding statements made by petitioner's co-conspirators during plea negotiations and at a prior trial.

3. Whether newly discovered evidence entitled petitioner to a new trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 799 F.2d 842.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1986. A petition for rehearing was denied on November 3, 1986 (Pet. App. 17). The petition for a writ of certiorari was filed on December 31, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and conspiracy to import, possess and distribute cocaine and marijuana, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of 12 and 10 years' imprisonment, to be followed by a lifetime special parole term. Petitioner also was fined $80,000. The court of appeals affirmed

(Pet. App. 1-16).

1. The evidence at trial established that petitioner's co-defendant, Jorge Serna, recruited Marco Castellon to assist in the importation into the United States of several tons of marijuana (Pet. App. 4). The marijuana arrived in Brooklyn on March 13, 1984, hidden in a shipment of furniture (id. at 3). While waiting for the shipment to clear Customs, Castellon and Serna met at a Miami restaurant with petitioner and Kenneth Chupurdy, who were to distribute the marijuana. The meeting, at which Castellon served as a translator, lasted approximately 30 to 35 minutes; petitioner -- who was introduced to Castellon as "Steven" -- discussed his plans to pay for and distribute the marijuana, as well as other drug transactions. Id. at 5-6.

Meanwhile, unbeknownst to the conspirators, Customs agents had discovered the marijuana. They made a controlled delivery of the shipment to its destination, a brokerage firm. On April 2, 1984, Castellon paid the firm for the cargo, and it was driven away by Chupurdy. Castellon and Chupurdy subsequently were arrested. Petitioner's name was found in an address book discovered in Chupurdy's motel room. Pet. App. 3-4.

After his arrest, Castellon agreed to cooperate with federal law enforcement agents. He provided a complete physical description of "Steven," whose last name he did not know. The agents concluded that "Steven" was most likely petitioner, who resided in the Boca Raton area. When shown a photographic array that contained petitioner's 1980 driver's license photo, Castellon tentatively identified petitioner as "Steven." The agents then obtained petitioner's 1984 diver's license photo, in which petitioner had lighter hair and a mustache, and placed it in an array. Castellon again identified petitioner's photo as that of "Steven." Pet. App. 4, 8.

2. At trial, petitioner sought to introduce the testimony

of Robert Buckhout, who proposed to testify as an expert on the unreliability of eyewitness identifications. After a voir dire at which Buckhout described his theories, the district court excluded the proffered evidence. The court concluded that Buckhout's testimony would not assist the jury in determining the accuracy of Castellon's identification of petitioner. Alternatively, the court found under Fed. R. Evid. 403 that the probative value of Buckhout's testimony was substantially outweighed by the danger of prejudice and jury confusion. Tr. 1108-1112.

The district court also excluded two other pieces of proffered defense evidence. Petitioner proposed to introduce Serna's statement, made to a federal law enforcement agent during the course of aborted plea negotiations, that petitioner was not involved in the transaction. Because Serna was a co-defendant with petitioner, however, the district court ruled the statement inadmissible under Fed. R. Crim. P. 11(e)(6), which provides that "any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty" may "not be admitted against the defendant who was a participant in the plea discussions." See Pet. App. 11. The district court also excluded the prior testimony of Chupurdy, offered at his own trial, that he had not attended the meeting in Miami. Because the prosecutor did not have a motive to challenge Chupurdy's statement at the earlier trial, the district court below found it inadmissible at petitioner's trial under Fed. R. Evid. 804(b)(1). While the court indicated that it would permit introduction of the evidence if the jury also was informed that Chupurdy had been convicted, petitioner's counsel rejected this offer. See Pet. App. 13-14.

3. The court of appeals affirmed all of these rulings. The court held that the district judge's exclusion of Buckhout's

testimony was "not clearly erroneous," explaining that "[a] trial judge is accorded broad discretion in admitting or excluding expert testimony under Fed. R. Evid. 702 and in excluding testimony under Fed. R. Evid. 403 because of the danger of jury confusion or unfair prejudice" (Pet. App. 14-15). Here, the court noted that Buckhout "was ignorant of the conditions under which Castellon identified [petitioner's] photograph" and that "many of [Buckhout's] conclusions coincided with common sense" (id. at 15). While the court explained that it was sensitive to "the dangers of testimony based purely on eyewitness identification," it concluded that "this expert's proferred testimony" would simply have "mudd[ied] the waters" (ibid.).

The court of appeals also affirmed the district judge's other evidentiary rulings. The court found it obvious that Serna's disavowal of petitioner's participation in the scheme was made during the course of plea bargaining (Pet. App. 11-12). And while Serna's statement was made to a Drug Enforcement Administration agent rather than directly to a government attorney, the court explained that Fed. R. Crim. P. 11(e)(6) "can be fairly read to require the participation of a Government attorney in the plea discussions, but not necessarily his physical presence when a particular statement is made to agents whom the attorney has authorized to engage in plea discussions" (Pet. App. 13 (emphasis in original)). Similarly, the court of appeals found the exclusion of Chupurdy's prior testimony to be proper, noting that the prosecutor in Chupurdy's case "wisely * * * chose to focu[s] his cross-examination on the details of Chupurdy's transportation of the [marijuana] * * * rather than to emphasize to the jury Chupurdy's denial of [the Miami] meeting. Thus, exclusion of Chupurdy's statements was not an abuse of the trial court's discretion since the prosecutor had no real motive to explore Chupurdy's earlier statements." Id. at 14.

Petitioner also sought a new trial, arguing that the government had violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose a telephone message from one "Benji" that was found in Chupurdy's motel room; petitioner argued that, had he been able to locate "Benji," he might have created doubt in the minds of the jurors about his own guilt. The court noted, however, that the government had been unable to discover "Benji's" identity prior to trial, and therefore "simply had no basis to believe that the slip had any relevance to this case" (Pet. App. 11). The court also concluded that, "in light of Castellon's certain identification of [petitioner]," petitioner had "failed to show 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'" (ibid. (quoting United States v. Bagley, No. 84-48 (July 2, 1985), slip op. 14)).

ARGUMENT

Before this Court, petitioner repeats the arguments that were rejected by the court of appeals. None has merit, and none warrants further review.

1. Petitioner first challenges (Pet. 5-10) the exclusion of Buckhout's evidence, contending that expert testimony on the reliability of eyewitness identifications is routinely admitted in other circuits. This contention is incorrect. A trial judge has broad discretion over the admission of expert testimony. See, e.g., Hamling v. United States, 418 U.S. 87, 127 (1974). And while several courts of appeals have indicated that expert testimony relating to the reliability of eyewitness identifications may be admissible in appropriate cases, these courts have emphasized that the evidence is excludable under Fed. R. Evid. 403 if it is unreliable, or if its introduction would confuse the jury or would waste time; the courts uniformly have left the decision whether to permit the introduction of such

evidence to the discretion of the trial judge. _/ Thus, as one court has noted -- in a decision on which petitioner relies (Pet. 10) -- "there is no federal authority for the proposition that such testimony must be admitted." United States v. Moore, 786 F.2d 1308, 1312-1313 (5th Cir. 1986) (emphasis in original).

The decision below falls squarely within this line of authority. The court of appeals held only that the district judge did not abuse his discretion in excluding Buckhout's testimony (Pet. App. 14). After examining the voir dire, the court of appeals noted that Buckhout was unfamiliar with Castellon's actual identification of petitioner and that "his proposed testimony basically consisted of general pronouncements" (id. at 15). In these circumstances, the court concluded that

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_/ This was the holding of United States v. Downing, 753 F.2d 1224 (3d Cir. 1985), on which petitioner relies (Pet. 9-10). The court of appeals in that case concluded that the district judge had erred in ruling that such expert testimony may never be admitted, and remanded to give the judge an opportunity to determine whether the proffered testimony would be helpful. Id. at 1228-1232, 1243. On remand, the district court concluded that the testimony -- offered by the unbiquitous Dr. Buckhout -- should be excluded because it was unreliable and confusing, and bore only a "weak connection" to the facts of the case. 609 F. Supp. 784, 790-792 (E.D. Pa. 1985). That ruling was affirmed on appeal without opinion. 780 F.2d 1017 (3d Cir. 1985). See also United States v. Sebetich, 776 F.2d 412, 418-420 (3d Cir. 1985). Three other courts of appeals also have indicated that expert testimony of this sort may be admissible, while declining to reverse convictions following the exclusion of the testimony. United States v. Moore, 786 F.2d 1308, 1312-1313 (5th Cir. 1986) (district court acted within its discretion in excluding evidence); United States v. Smith, 736 F.2d 1103, 1106-1107 (6th Cir. 1984), cert. denied, No. 84-5215 (Oct. 1, 1984) (exclusion of testimony not prejudicial); United States v. Fosher, 590 F.2d 381 (1st Cir. 1979) (district court acted within its discretion in excluding evidence). Other courts have held the exclusion of such evidence to be within a district court's discretion, without definitively deciding whether the evidence would be admissible under other circumstances. United States v. Brewer, 783 F.2d 841 (9th Cir. 1986), cert. denied, No. 85-6752 (Oct. 6, 1986); United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984); United States v. Watson, 587 F.2d 365, 368-369 (7th Cir. 1978), cert. denied, 439 U.S. 1132 (1979). Two circuits have ruled the evidence excludable without addressing Fed. R. Evid. 702. United States v. Benitez, 741 F.2d 1312, 1315 (11th Cir. 1984), cert. denied, No. 84-6171 (June 3, 1985); United States v. Brown, 540 F.2d 1048, 1053-1054 (10th Cir. 1976), cert. denied, 429 U.S. 1100 (1977).

the particular proffered testimony would only "muddy the waters" (ibid.). This factual determination is correct on the record here and does not warrant further consideration. _/

2. a. Petitioner's other evidentiary contentions also are without merit. The exculpatory statement made by Serna -- which was offered to a DEA agent who, at the instructions of an Assistant United States Attorney, was attempting to determine the sincerity of Serna's interest in a plea (Pet. App. 11-12) -- plainly came in the course of plea negotiations. The statement was thus inadmissible as a "statement made in the course of plea discussions with an attorney for the government." Fed. R. Crim. P. 11(e)(6)(D). _/ While the statement was made to a DEA agent rather than to a government lawyer, the court of appeals correctly concluded that Rule 11(e)(6)(D) was implicated because the agent's discussion with Serna had been authorized by an Assistant United States Attorney as part of continuing plea negotiations (see Pet. App. 13).

The Advisory Committee Notes to the 1979 Amendment to Rule 11 confirm that the Rule was intended to distinguish between statements made to law enforcement agents during routine questioning of a suspect, the admissibility of which are to be

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_/ Petitioner is incorrct in contending (Pet. 6-7) that the decision below is inconsistent with Barefoot v. Estelle, 463 U.S. 880 (1983). The court of appeals did not hold, as petitioner asserts, that an expert may testify only on the basis of personal knowledge. It concluded, instead, that the general and conclusory nature of Buckhout's proposed testimony, in combination with his lack of familiarity with the facts of this case, made his testimony more confusing than probative.

_/ Generally, such statements are inadmissible only "against the defendant who made the plea or was a participant in the plea discussions." Fed. R. Crim. P. 11(e)(6). As the court of appeals explained, however, if the statement had been introduced here "there is a strong likelihood that the jury would have considered it as evidence against Serna"; the court added that "[a] limiting instruction would have been ineffective to protect Serna from the devastating impact of the statement that was tantamount to a confession" (Pet. App. 12). Petitioner does not challenge this conclusion or argue that he should have been awarded a severance.

"resolved by that body of law dealing with police interrogations," and statements (such as the one here) made during sanctioned plea negotiations, which are "covered by the per se rule of 11(e)(6)." The other courts that have considered the issue agree that Rule 11(e)(6)(D) bars the admission of statements made to law enforcement agents during the course of authorized plea discussions. See United States v. Grant, 622 F.2d 308, 313 (8th Cir. 1980); see also United States v. Herman, 544 F.2d 791 (5th Cir. 1977) (pre-1979 version of Rule 11). _/ Review of this narrow issue accordingly is not warranted.

b. The exclusion of Chupurdy's prior testimony was, similarly, a proper exercize of the district court's discretion. Under Fed. R. Evid. 804(b)(1), a defendant may introduce former testimony only if the government "had a similar motive to develop the testimony by direct, cross, or redirect examination." Both courts below resolved this factual question by concluding that the prosecutor "had no real motive to explore Chupurdy's earlier statements" (Pet. App. 14). That conclusion was correct and does not warrant this Court's attention. As the court of appeals explained, Chupurdy acknowledged at his trial that he had transported the marijuana; his defense was that he mistakenly believed his cargo to be furniture. In cross-examining Chupurdy, the government's goal thus was not to identify the other participants in the conspiracy. It was,

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_/ Petitioner is incorrect in contending that this approach is inconsistent with Rachlin v. United States, 723 F.2d 1373 (8th Cir. 1983). In Rachlin, the court of appeals reiterated that statements made to agents in the course of plea negotiations are inadmissible "'where the law enforcement official is acting with express authority from a government attorney'" (id. at 1379 (quoting Grant, 622 F.2d at 313)). Rule 11(e)(6)(D) was not implicated in Rachlin because there was "no evidence that any Assistant United States Attorney ever gave the agents any authority to bargain with [the defendant]," and "the Assistant United States Attorney was in no way involved in arranging the * * * meeting where the incriminating statements were given" (723 F.2d at 1377).

instead, "to show that [Chupurdy's] claim of ignorance of [the] contents [of his tractor] was unbelievable" (ibid.). In these circumstances, exclusion of Chupurdy's former testimony was proper.

3. Finally, petitioner repeats his allegation of a violation of Brady v. Maryland, 373 U.S. 83 (1963) (see Pet. 15-17). He contends that, had he been aware of Chupurdy's message from "Benji," he could have argued to the jury that "Benji" had been the participant with Castellon and Chupurdy in the Miami meeting. But the court below found as a factual matter that, while "Benji" (who has since been identified) bears a resemblance to petitioner, petitioner "failed to show 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'" (Pet. App. 11 (quoting United States v. Bagley, No. 84-48 (July 2, 1095), slip op. 14)). Petitioner appears to recognize that this is the proper standard for determining entitlement to a new trial (see Pet. 16), and he offers no reason to doubt the validity of the court of appeals' factual conclusion. / Further review of this factual finding therefore is not warranted.

/ The court of appeals explained that "Benji" did not match Castellon's original description of "Steven": "Benji" is considerably shorter and has darker hair (Pet. App. 10-11). In addition, of course, petitioner's name in fact is Steven; "Benji's" name appears to be Benjamin Lee Weinstein.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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